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California v. Cabazon Band



A Quarter-Century of Complex, Litigious Self-Determination

By Matthew L.M. Fletcher

The U.S. Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), may be the most momentous decision in federal Indian law in the last 50 years. The decision provided a federal common law basis for Indian tribes to engage in high-stakes bingo and other gaming activities without state regulation, even in so-called Public Law 280 states like California that have criminal jurisdiction inside of Indian country. *Cabazon Band* provoked Congress to finally codify a regulatory scheme for Indian gaming, including an enactment that authorized Las Vegas-style casino gaming, under specific conditions, in the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.* Indian gaming, as a direct result of *Cabazon Band*, now has a market that generates more than \$26 billion a year nationally.¹

The Case

The state of California allowed bingo games to be played within the state for charity purposes, as long as the prizes for each game did not exceed \$250.² Riverside County, the home of the Cabazon Band of Mission Indians and the Morongo Band of Mission Indians, regulated these bingo games and also banned so-called card rooms. The Cabazon

and Morongo Bands opened up high-stakes bingo halls (Cabazon also operated a card room) and purported to operate them without regard to the state law and the county ordinances. California and the county sued the Cabazon Band, and the lower courts held that the state and county laws did not apply to the tribe. The U.S. Supreme Court granted certiorari.

Usually, when the Supreme Court grants a petition to review a decision made by a lower court, the Court does so with an eye toward reversing the lower court.³ Previous to the Ninth Circuit's decision in *Cabazon Band*, the Supreme Court had declined to review earlier decisions involving the Seminole Tribe of Florida and the Barona Group of Capitan Band of Mission Indians that favored those tribes.⁴ State government observers must have been as elated as tribal advocates were disheartened by the Court's decision to grant certiorari in *Cabazon Band*, especially because the lower courts uniformly favored tribal interests. Legislative negotiations in Congress about regulating Indian gaming stalled as the parties favoring state interests or an overall federal ban on Indian gaming sensed imminent victory.⁵

In a major surprise, the Supreme Court affirmed the Ninth Circuit in a 6-3 decision. The majority opinion in

Cabazon reaffirmed and clarified two important aspects of federal Indian law: the civil-regulatory/criminal-prohibitory analysis under Public Law 280 and the federal Indian law pre-emption analysis. For background purposes, Public Law 280 is a congressional statute that purported to extend state jurisdiction into Indian country in six states. In *Cabazon*, the Court's decision affirmed the so-called civil-regulatory/criminal-prohibitory distinction. The way it works is that a state statute that is "criminal-prohibitory" applies to activities that take place on the reservation, whereas a statute that is "civil-prohibitory" does not. *Cabazon* held that the state and county gaming laws were "civil-prohibitory," because they do not flat-out ban all gaming operations but merely purport to regulate them. The federal Indian law pre-emption doctrine held that, if the federal government and tribal interests are strong enough, they can pre-empt the application of nondiscriminatory state laws in Indian country in all states, including non-Public Law 280 states. Perhaps because the Court has retreated somewhat from those doctrines,⁶ the most important aspect of the opinion is the public policy analysis that the Court employed. California argued that state restrictions on gaming should apply in Indian country because of the possibility of organized criminal infiltration of tribal gaming operations, and the possible zones of unethical behavior that the state alleged would develop if gaming continued without state intervention. The tribes responded that the state had authorized multiple forms of gaming—such as the lottery, card rooms, horse racing, dog racing, charity bingo, and other forms of gambling—and California had no choice but to concede the tribes' argument. The state really couldn't argue with any force that criminal activity related to gaming was unique to Indian country when so much gaming occurred in accordance with state law, although it certainly did not stop the state from trying to do so.

The tribes also argued forcefully—and persuasively, as it turned out—that the gaming operations constituted the sole source of economic activity on the reservations:

The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.⁷

In the most critical component of the majority opinion in *Cabazon*, the Court noted the extent to which federal interests paralleled tribal interests permeating tribal gaming development:

These are important federal interests. They were reaffirmed by the President's 1983 Statement on Indian Policy. More specifically, the Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to

Indian tribes, has sought to implement these policies by promoting tribal bingo enterprises. Under the Indian Financing Act of 1974, ... the Secretary of the Interior has made grants and has guaranteed loans for the purpose of constructing bingo facilities. ... The Department of Housing and Urban Development and the Department of Health and Human Services have also provided financial assistance to develop tribal gaming enterprises. ... Here, the Secretary of the Interior has approved tribal ordinances establishing and regulating the gaming activities involved. ... The Secretary has also exercised his authority to review tribal bingo management contracts under 25 U.S.C. § 81, and has issued detailed guidelines governing that review.⁸

Tying tribal and federal interests together in this manner significantly undercut California's public policy assertions. As the Court has shown repeatedly over the decades, federal interests are far more important to the Supreme Court than tribal interests are. *Cabazon Band* set the stage for the final congressional negotiations over how the federal government would codify and regulate Indian gaming, if it did so at all.

Indian Gaming Regulatory Act

As a result of the Supreme Court's decision in *Cabazon Band*, in 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), an incredibly complex statute that has spawned hundreds of lawsuits in federal, state, and tribal courts in nearly every jurisdiction in the nation. The statute provided a statutory basis for Indian gaming that, despite the intense litigation surrounding key aspects of Indian gaming, has provided an important measure of predictability and legitimacy to Indian gaming. Most importantly, the IGRA codified the *Cabazon Band* holding, giving congressional consent to high-stakes bingo operations conducted for tribal government purposes on tribal lands and under tribal regulations.

The real crux of the IGRA was the provision for casino gaming: the so-called Class III games. 25 U.S.C. § 2710(d).⁹ Prior to *Cabazon Band*, tribal, federal, and state stakeholders all but assumed that Congress would not authorize Indian gaming, in part because the Johnson Act, 15 U.S.C. § 1171 *et seq.*, prohibited slot machines and other lucrative games in Indian country. But *Cabazon Band* dramatically changed the landscape, and tribal interests successfully lobbied to include a mechanism for casino games. The mechanism is almost laughably complex and is a key generator of litigation, but it is also a powerful engine for cooperation between tribes and states on any number of important governance issues.

The IGRA required tribes and states to negotiate a Class III gaming compact, assuming the state authorized some form of casino-style games, such as a charity games (harking back to the *Cabazon Band* analysis). The compact would detail the regulatory regime for the gaming operations, state which games could be played, and explain how the tribe would deal with the impacts (for example, public

safety) of its operations on surrounding communities. The IGRA banned states from demanding taxes in compacts and also provided that, if a state governor refused to negotiate in “good faith,” the tribe could take the state to federal court and either force negotiations or ask the Department of the Interior to promulgate a compact for the tribe.

Good Faith Lawsuits and the *Seminole Tribe* Ruling

The first round of lawsuits arising out of the IGRA were the so-called good faith lawsuits. States believed that Congress did not have the authority under the Commerce Clause to abrogate state sovereign immunity and force state negotiations. In 1996, the Supreme Court agreed with the states in the ruling handed down in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which returned to the states much of the bargaining power they had lost as a result of *Cabazon Band*. For about two years after the decision, no tribe was successful in negotiating a Class III compact, but that changed quickly after the Department of Interior began to acquiesce in a series of nifty legal maneuvers that have benefited both tribes and states over the last two decades.

Two important states, Connecticut and Michigan, had negotiated revenue-sharing provisions with the eight tribes located within their borders prior to *Seminole Tribe*. Revenue sharing is not much different from a tax on Indian gaming—a tax prohibited by the IGRA. But because they were faced with reticent state governors, the tribes in those states agreed to share their revenues (10 percent in Michigan and 25 percent in Connecticut) in exchange for what would later become known as a “meaningful concession.”¹⁰ In those two states, the tribes negotiated for a monopoly on Las Vegas-style gaming. After the *Seminole Tribe* decision, other tribes in other states began to follow suit, and Class III gaming began to mushroom.

For more than 10 years after *Seminole Tribe*, Indian gaming expanded almost exponentially. The state leadership in California and Oklahoma, states with enormous gaming markets, finally entered into Class III gaming compacts with significant revenue-sharing provisions. Each state could be said to have a percentage of Indian gaming revenue, which the state leadership could demand in exchange for a gaming compact. However, the promise of market exclusivity also began to erode as more and more tribes entered the gaming market, and some states began to authorize various forms of gaming under state law. States seemed to be demanding higher and higher percentages in exchange for a smaller economic benefit to tribes. In 2010, the Ninth Circuit held that California had negotiated in bad faith with the Rincon Band of Luiseño Mission Indians when the state sought 10–15 percent of tribal gaming revenue in exchange for what the court found was virtually nothing of value in *Rincon Band of Luiseño Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3055 (2011). Revenue sharing between tribes and states is in a state of confusion and uncertainty, and this question will affect the future of tribal gaming.¹¹

Tribal Self-Determination

In the Indian Gaming Regulatory Act, Congress mandated that a tribe’s gaming profits must be used for tribal governance purposes. 25 U.S.C. § 2710(b)(2)(B). For the 200 or so Indian tribes that operate gaming facilities profitably, the revenues have helped bring the members of those tribes up from economic destitution to the lower-middle class—an important development.¹² Most successful gaming tribes can afford to supplement the federal housing, health, public safety, and other federal appropriations with gaming revenues, but only a small number of tribes—most likely fewer than 20—have enough gaming revenue to be truly self-determinative.

That said, there are two important positive consequences to Indian gaming that very few people have really discussed. The first is the development of tribal institutions arising out of the need to regulate gaming enterprises strictly. The National Indian Gaming Commission, state regulators, tribal regulators, and even tribal creditors have placed layer over layer of regulation and strict compliance mechanisms on Indian gaming to ensure that Indian gaming is clean and protected from negative elements like organized crime. The beneficiaries of this incredible amount of regulation are tribal governance institutions. Tribal members employed by the gaming entity either as gaming managers or regulators quickly learn multiple and pervasive aspects of governance—from surveillance to regulatory paperwork and financial statements. Tribal gaming employees often move back and forth from the tribal government side, and they bring with them their expertise in business management and regulation.

A second important contribution of Indian gaming is improvement in relationships between tribal-state-local governments. The IGRA requires tribal leaders and state governors to negotiate gaming compacts before casino-style gaming can take place. 25 U.S.C. § 2710(d). As a result, state officials and tribal leaders who otherwise might not talk to each other in a civil manner now find it expedient to talk, and once that barrier is down, negotiations on any number of previously impassable tribal-state-local conflicts can develop. Sharing the revenues coming from tribal gaming encourages cooperation among all these levels of government; even better, where revenue sharing is not an option, tribes are being smart and progressive about their ability to use gaming revenues in creative ways to open doors at the state and local level. All of these developments are attributable to the Supreme Court’s *Cabazon Band* decision and related cases, in which state and local officials who once used shotguns and threats of incarceration to influence Indian tribes are now dealing with Indian tribes as peers.

The Dark Side of Indian Gaming

Gaming has consequences, and perhaps the biggest consequence for the most successful Indian tribes has been the need to deal with influxes of cash and assets into tribal governments and, through revenue allocation plans, to individual members of the tribe.¹³ In the context of tribal government actions, some tribal councils—especially those in California, but councils elsewhere as well—have noto-

riously begun the process of shrinking their enrollments through a process of disenrollment and even banishment of whole swaths of the tribe's membership. This development appears to outsiders to be a crass effort to increase remaining members' per capita share of the tribe's gaming revenue. These tribes usually do not have a tribal court system, and federal courts generally do not have jurisdiction over tribal membership claims. Therefore, assuming these Indians have lost their membership in the tribe illegitimately, they have little recourse.

A second consequence of gaming is related to the first, and it involves the ramifications of paying tribal gaming revenues to tribal members per capita. Tribal members receiving per capita payments, especially large sums, may have had no prior experience with dealing with such large amounts of money. There is some anecdotal evidence that tribal members do not handle such influxes well, with many asserting that younger tribal members see no value in continuing education, for example, because their "per caps" cover their expenses. Moreover, outsiders view these payments as cash cows, and at least one state court has held that a father who was a tribe member was not required to pay child support because his ex-wife and child—both of whom were tribe members—were both entitled to significant per capita payments. See *Cypress v. Jumper*, 990 So. 2d 576 (Fla. App. 2008).

In its ruling in *Cabazon Band*, the Supreme Court rejected California's assertion that the state's interest in regulating (and even banning) Indian gaming related to the threat of organized crime, corruption, prostitution, drugs, and any other crimes the state's lawyers imagined were attached to gaming operations. In the dissent to *Cabazon Band*, Justice Stevens wrote: "Accepting the majority's reasoning would require exemptions for cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises." *Cabazon Band*, 480 U.S. at 222 (Stevens, J., dissenting). As a general matter, none of those concerns have arisen in Indian gaming.

Finally, one dark side to Indian gaming is the inequity among tribes that gaming has fostered. The large majority of Indian tribes have no gaming enterprises at all, and only a very small minority of tribes could be said to be overly successful. To some extent, there is a "one percent" problem in Indian gaming, just as there is in the rest of the American economy.

The Future of Indian Gaming: The Legacy of *Cabazon Band*

The future of Indian gaming is murky. Since the beginning of the explosion of Indian gaming, commentators and tribal leaders have worried that gaming was a temporary opportunity and that the market for Indian gaming would eventually decline or even disappear. Tribal leaders knew that gaming would never be a complete solution to the socioeconomic problems in Indian country that date back centuries, and these leaders have sought to diversify their tribes' economic portfolios since the beginning of the gaming explosion. In fact, the market seems to have reached a plateau. When the Supreme Court decided *Cabazon Band*, only Nevada and New Jersey had significant casino-style

gaming. Early tribal gaming operations had the benefit of only having to compete with one another, but that has all changed dramatically. Dozens of states have authorized some form of casino-style gaming outside of Indian country, and Internet gaming is on the horizon. Even though Indian gaming currently enjoys revenues totaling more than \$26 billion a year market, that market share could fall dramatically and it could fall soon.

Moreover, the Supreme Court's reasoning behind its decision in *Cabazon Band* has not aged well. Some, including myself, argue that the Supreme Court's views on Indian affairs have changed, perhaps as a result of the explosion of Indian gaming the Court might not have foreseen. None of the reasoning in *Cabazon Band* has been overruled, but one of the key foundations of the opinion—federal Indian pre-emption doctrine—has all but disappeared from the legal landscape as an effective tool for tribal interests. Two years after *Cabazon Band*, the Supreme Court in *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989), all but eviscerated the pre-emption doctrine, finding that a tribe's governmental interest in avoiding state taxation of nonmembers on its territory was negligible. The same kinds of interests that at least partially animated the Court in *Cabazon Band*—lack of economic development opportunities in a desert environment—meant almost nothing in *Cotton Petroleum*.

The second foundation of the *Cabazon Band* decision, the interpretation of Public Law 280 through the civil-regulatory/criminal-prohibitory distinction, remains intact. But the Court has not returned to the common law that has arisen out of this area, and state courts are left to their own devices to flesh out the meaning of the doctrine in a wide variety of cases. The outcomes in such cases are unpredictable, as tribal and state advocates in Washington, California, Minnesota, Wisconsin, and elsewhere have complained for many years.¹⁴

Regardless, *Cabazon Band* remains one of the most important decisions in Indian law of the modern era dating back to the 1950s. Courts and commentators have cited the ruling more than 2,300 times, demonstrating its continued relevance as a starting point for tricky questions of federal Indian law. And no case has been more important to Indian gaming communities and even to Indian tribes that do not engage in gaming than *Cabazon Band* has, because the decision has created an area where Indian tribes can develop a political, legal, and economic infrastructure that all of Indian country enjoys to this day. Ask any Indian lawyer who worked in Indian country back in the 1980s and before then. **TFL**

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Endnotes

¹The National Indian Gaming Commission announced that Indian gaming revenues were \$26.5 billion in 2010—the fourth consecutive year that tribal gaming revenues exceeded \$26

billion a year. *National Indian Gaming Commission, National Indian Gaming Commission Announces 2010 Industry Gross Gaming Revenue: Indian Gaming Revenues Remain Stable* (July 18, 2011), available at www.nigc.gov/Media/Press_Releases/2011_Press_Releases/PR-175_07-2011.aspx.

²Much of the material about the *Cabazon* and *Morongo* cases, which the courts consolidated into one case, is derived from Ralph A. Rossum, *THE SUPREME COURT AND TRIBAL GAMING: CALIFORNIA V. CABAZON BAND OF MISSION INDIANS* 9–24, 84–133 (2011).

³See S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision “On the Merits,”* 4 *POLITY* 429 (1972).

⁴*Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Calif. v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). See also *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981).

⁵Discussion in this short paper about the legislative history of the Indian Gaming Regulatory Act is based almost entirely on Frank Ducheneaux’s important article on the IGRA. See Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 *ARIZ. ST. L.J.* 99 (2010). See also Robert N. Clinton’s important paper, *Enactment of the Indian Gaming Regulatory Act of*

1988: *The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?* 42 *ARIZ. ST. L.J.* 17 (2010).

⁶See generally Matthew L.M. Fletcher, *The Supreme Court and the Rule of Law: Indian Law Case Studies*, 55 *FED. LAW.*, March/April 2008, at 26.

⁷*Cabazon Band*, 480 U.S. at 218–19.

⁸*Id.* at 218 (footnotes and citations omitted).

⁹Class III gaming is defined in 25 U.S.C. §§ 2703(7), (8).

¹⁰Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from Statutes in Gaming Compacts to Further Tribal Economic Development: Satisfying the Economic Benefits Test*, 54 *S.D. L. REV.* 419 (2009).

¹¹See generally Zeke Fletcher, *Indian Gaming and Tribal Self-Determination: Reconsidering the 1993 Tribal-State Gaming Compacts*, 89 *MICH. B. J.*, Feb. 2010, at 38.

¹²See generally Steven Andrew Light and Kathryn R.L. Rand, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 77–118 (2005).

¹³See generally Stephen Cornell et al., *Per Capita Distributions of American Indian Tribal Revenues: A Preliminary Discussion of Policy Considerations*, unpublished manuscript (Native Nations Institute, Nov. 2007), available at www.investnative.org/research_policy_pubs/Per_Capita_Distributions_NNI.pdf.

¹⁴See generally Arthur F. Foerster, *Comment: Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 *UCLA L. REV.* 1333 (1999).

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